



Mike Stafford
Harris County Attorney

February 21, 2006

**Via Facsimile (512) 239-3311 and
First Class Mail**

Ms. LaDonna Castañuela
Office of Chief Clerk, MC-105
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Re: Application by Southern Crushed Concrete, Inc., to Change the Location of a Concrete
Crushing Facility in Harris County; SOAH Docket No. 582-05-1040; TCEQ Docket No.
2004-0839-AIR.

Dear Ms. Castañuela:

Enclosed for filing is **Harris County and the City of Houston's Exceptions to the
Proposal for Decision** in the matter referenced above. Copies of this filing are being provided to
the Administrative Law Judge and all parties by fax and first class mail.

If you have any questions or comments, please call me at 713-755-8284. Thank you for
your time and consideration.

Sincerely,

MIKE STAFFORD
Harris County Attorney

Snehal R. Patel
Attorney for Harris County

MAS/SRP/keg
Enclosure

cc: Service List

FILED
COUNTY CLERK
HARRIS COUNTY
JAN 31 2006

SOAH DOCKET NO. 582-05-1040
TCEQ DOCKET NO. 2004-0839-AIR 11-12-29

APPLICATION BY SOUTHERN	§	BEFORE THE STATE OFFICE
CRUSHED CONCRETE, INC., TO	§	
CHANGE THE LOCATION OF A	§	OF
CONCRETE CRUSHING FACILITY IN	§	
HARRIS COUNTY	§	ADMINISTRATIVE HEARINGS

**HARRIS COUNTY AND THE CITY OF HOUSTON'S EXCEPTIONS TO THE
PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COME NOW, Harris County and the City of Houston, and file exceptions to the Proposal for Decision (PFD) issued January 31, 2006, in the above-referenced matter, and would respectfully show the following:

The Honorable Administrative Law Judge Craig R. Bennett (ALJ) has recommended that the application by Southern Crushed Concrete, Inc. (SCC), for a change of location from 5001 Gasmer Street to a site located at or near the intersection of Bellfort Avenue and State Highway 288 (288 site) under proposed Permit No. 70136L001 be granted, with the additional permit conditions set forth in the PFD and the order. The ALJ has stated that "given the safeguards provided by the recommended conditions and the protection of health suggested by Applicant's modeling and testimony, the preponderance of the evidence suggests Applicant's requested change in location of its concrete crushing operations will not create a nuisance, will be protective of public health, and should be granted."¹ While Harris County and the City of Houston appreciate the efforts of the ALJ to make this proposed permit protective of human health and the environment with the addition of special conditions, Harris County and the City of Houston are not convinced that the addition of these special conditions will indeed be protective of human health and will address nuisance concerns; and therefore, continue to urge the ALJ to deny this application.

Harris County and the City of Houston respectfully disagree with the ALJ's PFD and associating findings of facts and conclusions of law that: 1) SCC's modeling was properly conducted and that SCC's emissions modeling and calculations are accurate; 2) operation of the proposed facility will not cause adverse health effects to people living within one mile of the facility; 3) concrete crushing operations at the 288 site will not present the likelihood of nuisance

¹ PFD at 42.

or damage to surrounding property; 4) concrete crushing operations are not likely to have an adverse effect on air quality; 5) stockpile emissions are adequately addressed in the permit; and 6) except for watering, no additional recordkeeping requirements are necessary.

Harris County and the City of Houston specifically except to Findings of Fact Nos. 39, 40, 41, 47, 48, 49, 50, 52, 54, 55, 56, 58, 60(b), (c), (d), (e) and (f), 61, 63, 64, 65, 66, 67, 68, 69, 79, 84, 85, 86, 87, and Conclusions of Law Nos. 9, 10, 11, 12, 13 (in part), 14, 15, 16, 17(a) and (c) (in part), and 18 (and corresponding ordering provisions). Harris County and the City of Houston agree with Citizens Against Southern Crushed Concrete's (CASCC) and Texas Pipe and Supply Company, Ltd.'s (TPSC) Exceptions and incorporate those arguments herein.

Harris County's, City of Houston's, CASCC and TPSC's, and OPIC's extensive closing arguments, response to closing arguments, and proposed joint findings of fact and law fully discuss the supporting facts and provide detailed analysis establishing that SCC has not met its burden by preponderance of evidence on any of the six issues. These issues are highlighted in these exceptions with further clarification where necessary.

Issue 1: Whether or not the Applicant's emissions calculations and modeling are accurate.

The ALJ found that the modeling runs performed by the Applicant represented accurate and conservative predictions of air quality impact from the proposed facility.

Exception 1: The ALJ should not have found that the modeling results performed by the Applicant represented accurate and conservative predictions of air quality impact from the proposed facility. Harris County and the City of Houston except to Finding of Facts Nos. 39, 40, 41, 47, 48, 49, 50, 52, 54, 55, 56, 58, and Conclusion of Law Nos. 9, and 17(a).

Road Emissions

The ALJ states that some parties apparently misunderstand the testimony of the application of control factors, believing that the 99% factor applied to all roads at the site. Harris County and the City of Houston understand the distinction, and Harris County's closing arguments discuss the 99% verses the 95% fully because therein lies a flaw. SCC erroneously claims 95% control efficiency for paving and watering for other on-site roads when those roads are made up of milled asphalt and not hot-mix asphalt. In addition, SCC is taking a 99% control efficiency credit for a wet-sweep and vacuum truck although there is no evidence in the record to

indicate that by wet-sweeping and vacuuming the main entrance and exit roads daily as SCC has agreed to do, will result in a 99% percent control efficiency. As such, utilizing the unpaved road emissions factor and utilizing a 99% emissions control factor which relies on the road being vacuumed and wet is erroneous, and goes against all common sense in a hot environment like Houston in which evaporation of water on a hot asphalt road would be extremely rapid. Harris County and the City of Houston argue that due to the over-estimation of the emissions control factor utilized by SCC, its burden of proof (by the preponderance of the evidence) has not been met.

As to the question of what is a paved road, the ALJ provides that ED did not participate as a party in this case and has not offered any evidence as to the generally acceptable meaning of the term "paved" for enforcement or air permitting purposes. However, the ALJ completely disregards the testimony of Ms. Elizabeth Guynn, senior investigator and training coordinator with Harris County Pollution Control Division. Under authority provided by the Texas Clean Air Act, Ms. Guynn has been enforcing state statutes, rules, and permits for the last 15 years, and has extensive experience with permitting and enforcement issues related to material handling facilities such as concrete crushing facilities. Ms. Guynn's extensive testimony on what constitutes a paved road should be given appropriate weight (see Harris County's closing arguments and response).

The ALJ is also persuaded by Mr. Miller's testimony with regard to what a "paved road" means when it was clear by his own admission that Mr. Miller's testimony was limited to his own personal use of the terms and his company's practice. It should be pointed out that Mr. Miller was not offered as an expert witness on roads, and road building is not even one of Mr. Miller's job responsibilities.² His areas of expertise are listed as preparing application materials and coordinating with TCEQ, sales and marketing; bidding and estimating demolition projects; overseeing SCC's agreement with truck operators; and handling accounts receivable and payable for SCC's operations.³ These areas of expertise are characteristics of business management expertise rather than technical knowledge of milled asphalt road surfaces. SCC also offered no other reliable expert testimony or scientific studies to overcome its burden.

Lastly, the ALJ turned to a dictionary definition that states "a hard smooth surface . . . that will bear travel." This definition is not appropriate within the context of air quality

² A-Ex 51 at 2, lines 3-15.

³ *Id.*

permitting. The purpose for specifying a paved or unpaved road is to limit air emissions. Both a gravel road or a paved hot-mix asphalt road, arguably, can be hard and smooth and bear travel; however, both cannot be called a paved road. Even Mr. Miller agreed that the milled asphalt road will have a different surface from a hot-mix asphalt⁴ and for the purposes of appropriate control factors; common sense dictates that the control efficiency cannot be the same for a paved hot-mix asphalt road versus a milled asphalt road.

As a final measure, the ALJ recommends a six-mile speed limit. As discussed in previous briefs, establishing a permit provision requiring that vehicles at the SCC plant will travel at six-miles per hour is contrived; and SCC agreeing to include it as a permit condition in their closing arguments is merely an attempt to divert attention from the real issue which is that SCC should have correctly used the AP-42 factor for paved roads. There is simply no practical purpose for a six-mile per hour speed limit except to allow SCC to attempt to fall within the unpaved factor and thereby to under-predict emissions at the proposed site. In addition, it is hard to imagine that those trucks will be crawling at six-miles per hour along that long stretch of the haul road even with speed limits posted. Environmental investigators are also not police officers and while they may carry range finders which measure distance, carrying radar guns would clearly be outside of their job descriptions. As such, a permit that includes a speed limit would be unenforceable. Thus, even with a six-mile per hour speed limit in the proposed permit, SCC's use of the unpaved road factor for its road emission calculations would be based on faulty assumptions that would not reflect real-world operations.

Stockpile Emissions

Harris County and the City of Houston disagree with the ALJ's assessment of stockpile emissions. Stockpile emissions estimates must include particulate matter emissions from several points in the storage cycle including material loading, disturbances by strong wind currents, load out from the pile, and movement of trucks and loading equipment in the storage pile area.⁵ Additionally, dust emissions may be generated by wind erosion of open aggregate storage piles and exposed areas within an industrial facility.⁶

SCC relies on the TCEQ Air Permits Division's draft Rock Crushing Plants Guidance dated February 2002, which refers to AP-42 for stockpile emissions calculations. The formula

⁴ Tr. at 133, lines 13-25; at 134, lines 1-24.

⁵ U.S. EPA, AP-42 §13.2.4.1.

⁶ U.S. EPA, AP-42 §13.2.5.1.

does not include a variable for production or throughput rates surface area of the stockpile, wind speed or friction velocities of the stockpile. In essence utilizing this method means that as long as the total acreage remains the same, the emissions will not increase. This is a fatal flaw in calculating stockpile emissions. Moreover, the AP-42 factor for stockpile emissions that the draft TCEQ recommends has a “D” rating which even the ALJ when addressing another “D” rating (for paved road factor), appears to believe it is a “relatively poor predictor of emissions.”⁷ In all fairness, there needs to be additional finding of fact 49(b) stating that the stockpile emission factor has a “D” rating and is a poor predictor of emissions.

Harris County and the City of Houston disagree with the ALJ that the SCC has some level of conservatism to SCC’s stockpile emissions calculations. A close scrutiny of each of SCC’s “conservative factors” indicated that these factors are not as conservative as SCC indicates. Harris County directs ALJ’s attention to the Harris County’s Response to Closing Argument for a complete analysis on this. Harris County believes due to the underestimation of the stockpile emissions utilized by the SCC, its burden of proof (by the preponderance of the evidence) has not been met.

Background Concentrations

Harris County and the City of Houston urge the ALJ to re-examine SCC’s use of the Croquet monitor as well as the Bissonnet monitor. While the ALJ includes footnote 41 in the PFD, with the modeling results related to Mr. Prince’s first set of figures; there is no consideration given to SCC’s background concentrations using the nearby Croquet site in the section specific to Background Concentrations or in the findings of fact. Mr. Prince maintains that both these numbers would be conservative and demonstrate compliance.⁸ As such, Mr. Prince’s first set of figures (footnote 41 of the PFD, page 23) must be included as a finding of fact.

The ALJ has concerns with the Mae Drive location including the proximity to Interstate 10 and the Houston Ship Channel. This is puzzling because the 288 site is located directly adjacent to a major highway and in close proximity to another major highway 610. The ALJ also has concerns with the Houston Ship Channel. However, it is the Clinton monitor which Mr. Hunt rejected, which is the closest to the Houston Ship Channel. The SCC site is across the

⁷ PFD at 9.

⁸ Tr. at 225, lines 2-6.

street from a pipe manufacturing facility which would have significant truck traffic and is located near two major highways (610 and 288) with Beltway 8 to the south of the facility with high level of vehicular traffic, and is directly south of downtown.⁹ As such, either the Croquet monitor or the Mae Drive monitor would be the most appropriate to use.

Screen Modeling

Harris County and the City of Houston respectfully disagree with the ALJ's analysis that there is no error in SCC's screen modeling and that the screen modeling was intended to serve a limited purpose and was not intended to be a projection of all emission rates. However, for the purposes of ED review, the flawed screened modeling was used to reach ED's position to issue the permit. Also, looking at it another way, Mr. Hunt's screen modeling predicted that emissions from pile formation (i.e., where processed material falls into product piles) by itself would exceed the state one-hour and three-hour TSP standards at 100 feet.¹⁰ This demonstrates a critical flaw in the screen modeling because it seems to be saying that one source by itself measuring 1,000 cubic feet only may exceed standards but if you combine this source and all other sources into a large volume source, air quality standards will not be exceeded. This is counter-intuitive to the real world because common sense says that one source by itself is likely to have lower amount of emissions than when that source is combined with other sources and presumably greater predicted impacts. For example, holding everything else constant, a stockpile combined with emissions from aggregate handling, crushing operations and screening operations would have higher emissions than a stockpile by itself because the sum of the total would be greater.

Short-term Modeling

The ALJ agrees with SCC that it was proper for SCC's short-term modeling to not include road emissions because the TCEQ's guidelines are clear. However, there is no longstanding TCEQ policy that haul road emissions should not be included in short-term modeling runs. In the two known cases where this issue has been brought outside of the ED's arena and before a neutral ALJ and TCEQ commissioners, short-term road emissions have been

⁹ P-Ex 11 at 24, lines 711-721.

¹⁰ Tr. at 239, lines 5-10. Mr. Prince has calculated his pile formation at 3 feet by 3 feet by 25 feet. Tr. at 238, lines 5-15.

included.¹¹ In fact, the ALJ includes a finding of fact 41(d) that in at least two prior permitting cases; the commission has recognized and allowed the use of an unpaved road factor in regard to predicting emissions from concrete facilities. Similarly and in all fairness, there needs to be a finding of fact, that in those two cases, the commission has recognized and allowed the use of short-term modeling. In addition, the Steib memorandum dated 2000 that the ALJ relies on, was written following Ingram by ED staff,¹² and there is no indication in the record that it has since been “tested” in a contested case hearing and considered by an independent ALJ or if it has been formally approved by the three current commissioners.

The ALJ also argues that even if the modeling is used that includes site roads, the ALJ does not find a violation of state property-line standards. It is correct that SCC’s rebuttal modeling used short-term road emissions but the last minute tinkering of the model simply demonstrates that with selective parameters which do not take into consideration all of the appropriate factors, the one-hour and three-hour TSP standards may be met. The record also shows that such a demonstration does not preponderate in favor of a finding a fact in SCC’s favor especially when weighed against evidence that indicates that use of unpaved factor, together with inappropriate use of certain control factors, underpredict emissions.

Issue 2: Would operation of the facility have an adverse effect on the health of the requesters who live within one mile of the facility.

The ALJ has found that emissions from PM₁₀, Crystalline Silica, and Total Suspended Particles (TSP), will not have an adverse impact on the health of requesters who live within one mile of the facility.

Exception 2: The ALJ should not have found that emissions of PM_{2.5} and TSP will not have an adverse effect on the health of the requesters who live within one mile of the facility. Harris County and City of Houston except to Finding of Facts Nos. 60(b), (c), (d), (e), and (f), 61, 63, and Conclusion of Law Nos. 10, and 16.

¹¹ The ALJ includes a finding a fact of fact 41(d) that in at least two prior permitting cases, the commission has recognized and allowed the use of unpaved road factor in regard to predicting emissions from concrete facilities. Similarly and in all fairness, there needs to be a finding of fact, that in those two cases, the commission has recognized and allowed the use of short-term modeling.

¹² A-Ex 32.

Harris County and the City of Houston do not agree that the predictive PM_{2.5} emissions, calculated by flawed modeling, while complying with the Federal National Ambient Air Quality Standards (NAAQS), will in fact protect the health of those who live within one mile of the facility.

Current Body of Science. While the current NAAQS are designed to not “endanger public health and welfare,”¹³ the body of available information regarding the adverse health effects of particulate matter has expanded greatly since the NAAQS were set. As such, Harris County and the City of Houston urge the ALJ to recognize the EPA Staff Paper developed with contributions from numerous scientists in a wide variety of scientific disciplines which urges a reduction in the particulate matter NAAQS,¹⁴ and to apply the thresholds as recommended by EPA staff, CASAC, and Dr. Fraiser.

The findings of fact also must include the fact that over 80 time-series studies were conducted in the United States and Canada that provide evidence of associations between PM_{2.5} and serious health effects in areas with air quality *at and above the current annual PM_{2.5} standard* (15 micrograms per cubic meter), which was set to provide protection against health effects related to both short-term and long-term exposures to fine particles.¹⁵ Included in the over 80 time-series studies conducted were also three key studies conducted in Phoenix, Santa Clara County, and eight Canadian cities which reported statistically significant associations between short-term PM_{2.5} exposure and total cardiovascular mortality in areas in which long-term average PM_{2.5} concentrations ranged between 13 and 14 micrograms per cubic meter.¹⁶ Failure to include this in the findings of fact is a substantive error.

As discussed in previous briefs, the risk assessment combined information about daily PM air quality for the study areas with estimated concentration-response functions derived from epidemiological studies and baseline health incidence data for specific health endpoints to derive estimates of the annual incidence of specific health effects occurring under “as is” air quality. The 15 micrograms per cubic meter annual average standard was the controlling standard in all five-study areas.¹⁷ For long-term exposure mortality, the initial cutpoint is 7.5 micrograms per

¹³ 42 U.S.C.A. § 7408(a)(1)(A) (2000).

¹⁴ HC-Ex 3; *see* HC-28 at 8, lines 16-36.

¹⁵ HC-Ex 3, 4.

¹⁶ *Id.*

¹⁷ *Id.*

cubic meter which is the lowest of the lowest measured levels used in the long-term exposure studies.

For Detroit, going from just meeting the current standards (15 micrograms per cubic meter annual and 65 micrograms per cubic meter daily) to just meeting the lowest set of standards considered (12 micrograms per cubic meter annual and 25 micrograms per cubic meter daily) reduces long-term exposure mortality incidence by 60 percent.

The same general patterns can be seen in other locations considered in the Staff Paper.¹⁸ For the annual PM_{2.5} standard, based on a cutpoint of 7.5 micrograms per cubic meter, staff observed that alternative annual standard levels of 14, 13, or 12 micrograms per cubic meter result in generally consistent estimated risk reductions from long-term exposure to PM_{2.5} of roughly 20, 30, or 50 percent, respectively, across all five example cities.¹⁹

The latest scientific information and risk assessment by EPA scientists must be given appropriate weight.

Crustal Materials (Findings of Fact 60e & d). The evidence on the record simply does not preponderate in favor of a finding of fact in the record establishing that the majority of emissions from the SCC facility will consist of materials that can be classified as crustal in nature. Finding of Fact 60(d) must be deleted.

The ALJ is swayed by the spurious argument that particulate matter from SCC's concrete crushing facility is pristine crustal material as in from the earth's crust. The Protestants, the City of Houston, and Harris County's position and response to SCC regarding crustal material is not provided in the PFD at all.

The ALJ also relies on Dr. Dydek's testimony stating that Dr. Dydek testified that the SCC emissions would be from crustal materials; and points out that Dr. Fraiser could not make a determination. An expert's testimony should be based on reliable foundation which as the record shows is entirely lacking in Dr. Dydek's testimony regarding crustal materials. Neither Dr. Dydek nor Dr. Fraiser have conducted an analysis of concrete dust expected to be found at the SCC site and neither can make a factual determination about emissions from the proposed Site and whether it will consist of crustal materials. Both, however, offered testimony generally with regard to concrete dust.

¹⁸ *Id.* at page 4-65.

¹⁹ HC-Ex 4 at 5-24.

Dr. Dydek offered some questionable evidence as to the composition of concrete dust generally. Dr. Fraiser, based on her 16 years of toxicological experience, including performing a complex multi-media health assessment on behalf of TCEQ for a concrete manufacturing plant's permit application,²⁰ gave her opinion on contaminants that can be found in concrete dust.²¹

The fact of the matter is that all of this needs to be read in the context of a SCC's proposed crushing operations which receives used concrete found in the urban setting of the Houston-Galveston area. SCC attempts to compare the concrete materials they would receive as "crustal" as in from the Earth's crust (i.e., natural geologic materials). SCC attempts to oversimplify the issue by arguing that volume of concrete would consist of sand, gravel, and other geologic material.²² However, as Dr. Fraiser testifies the volume is not necessarily what is important from a toxicological perspective and there could be "other anthropogenic materials depending on what the source of the concrete was" and "depending on where the concrete came from."²³ Dr. Fraiser's opinion is that recycled concrete can contain metals.²⁴

In SCC's case, the material would be used concrete pulled from source such as "major arteries" such as Loop 610,²⁵ "city streets," "airport runways, bridges that have been demolished,"²⁶ and from individuals for which the "waste concrete" could come from various sources.²⁷ When asked if it would matter to Dr. Fraiser if the concrete that was being recycled came from slab versus concrete that was recycled from a road in the context of crustal materials, Dr. Fraiser responded that, "it would matter to me potentially if the concrete came from a road versus if the concrete came from a slab, because I think clearly concrete that comes from a road could have combustion-by-products on it; for example, polycyclic aromatic hydrocarbons, components of diesel emissions."²⁸ Dr. Fraiser continues to state that it is inevitable that you would have polycyclic aromatic hydrocarbons which are carcinogens and you could have dioxins, for examples."²⁹ Dr. Fraiser states that those are common by-products . . . and you could also have benzene, toluene, ethyl benzene, xylenes, components of gasoline . . . because cars are

²⁰ HC-Ex 28 at 3, lines 2-14. Risk assessment conducted by Dr. Fraiser was based on extensive environmental studies with air and soil samples taken. *Id.*

²¹ See e.g., Tr. 437, lines 1-5.

²² Tr. at 412, lines 22-24.

²³ Tr. at 413, lines 10-12.

²⁴ Tr. at 413, lines 12-13.

²⁵ Tr. at 28, lines 17-19.

²⁶ Tr. at 119 lines 1-5.

²⁷ Tr. at 30, lines 1-7.

²⁸ Tr. at 427, lines 24-25, at 428, lines 1-12.

²⁹ Tr. at 436, lines 24-25; at 437, lines 1-4.

driving on it.³⁰ Dr. Fraiser also states that from her past experiences, there has historically been some concern over chromium in cement that is produced at those facilities.³¹ To sum this all, even the Staff Paper quoting the Criteria Document states that, under some conditions, crustal particles may become sufficiently toxic to cause human health effects . . . for example, resuspended crustal particles may be contaminated with trace elements and other components from previously deposited fine PM, e.g. metals from smelters or steel mills, PAHs from automobile exhausts, or pesticides from agricultural lands.³² Dr. Fraiser concludes that, “with road base materials, you could certainly have crustal materials that were enriched with organic contaminants.”³³ Dr. Dydek was also questioned about Harris County’s Exhibit 5 which is one of the studies Dr. Fraiser reviewed and is cited as a key study in the Staff Paper and the Criteria Document. Dr. Dydek agreed that concrete contains calcium, silicates, iron and that the study found fine-fraction calcium to have some association with mortality and with iron and silicates as well.³⁴ On rebuttal, Dr. Dydek attempted to provide testimony based on a few hours of Google research on the content of road dust but was found to be held inconclusive by the ALJ.³⁵

As discussed in previous briefs, the ALJ also does not consider Dr. Dydek’s testimony in the context of the larger picture which is that his testimony has been found to be inadmissible in a court of law because it was not based on reliable foundation; and that, Dr. Dydek has a website where he states that he can furnish relevant and reliable expert testimony that will hold up in court and help you win your case.³⁶ Any retained expert should enter a case with an unbiased eye and not with the goal “to help you win your case.” Dr. Dydek’s position on rebuttal that included some last minute Google searches was also found by the ALJ to not be reliable. Overall, it is surprising that the ALJ found Dr. Dydek to be persuasive because Dr. Dydek as an expert simply fails to offer reliable testimony.

PM_{2.5} Emissions. Harris County and the City of Houston respectfully disagree with the ALJ that ultimately, the specific composition may not be that relevant in this case because the

³⁰ Tr. at 437, lines 5-7.

³¹ Tr. at 437, lines 9-13.

³² HC-Ex 4 at 5-57; Tr. at 428, lines 20-25; at 429, lines 1-2.

³³ *Id.* at 429, lines 3-8.

³⁴ Tr. at 677-679; at 680, lines 1-2.

³⁵ Tr. at 688, lines 3-25; at 689, line 1. The Judge allowed him to maintain his earlier testimony that he still believes that’s reliable and that he has not found anything to controvert it. *Id.* It needs to be clarified that it was Dr. Fraiser who provided opinions on the content of concrete based on cross-examination and redirect. Dr. Dydek’s opinions prior to this redirect testimony are found at pages 285-288 in the testimony and that testimony does not discuss Chromium, PAHs or Dioxins in concrete.

³⁶ Tr. at 266 -267.

modeled emissions fall within a range that appears safe even under the Staff's proposed emissions levels. The ALJ bases this on Mr. Prince's PM_{2.5} emissions levels as being 11.7 micrograms per cubic meter annually and 36.1 micrograms per cubic meter for the 24-hour averaging period.³⁷ The amounts in the Staff Paper are between 12 and 14 micrograms per cubic meter annually and 30 and 40 micrograms per cubic meter on 24-hour standard basis. However, the ALJ disregards footnote 41 of its own PFD where Mr. Prince conceded that the figures of 14.0 micrograms per cubic meter annually and 44.1 micrograms per cubic meter for the 24-hour averaging period would be reasonable upon using different background concentrations. The following is a comparison between Mr. Hunt's and Mr. Prince's modeling results as compared to the 1997 PM_{2.5} standards, protective standards as recommended by Dr. Fraiser, and EPA staff's recommendations, as provided in Harris County's Response:

Modeling Results	Avg. Period	Background	Total Conc.	1997 Standard	Alternative	EPA Staff
Hunt Results (P-Ex 9)	Annual 24-Hour	13.5 31	14.6/14.2* 50.4/47.4	15 65	12 25	14-12 with 30-40 or
Prince Results A (HC-Ex 30)	Annual 24-Hour	10.3 26	11.7 36.1	15 65	12 25	
Prince Results B (HC-Ex 31)	Annual 24-Hour	12.7 34	14.0 44.1	15 65	12 25	30-25 with 15

* The first set of numbers is using the paved road formula and the second uses the unpaved factor.

** Concentrations are in micrograms per cubic meter.

Based on Mr. Prince's own admissions, Mr. Prince's modeled emissions do not fall within a range that appears safe even under the EPA staff's proposed levels. Mr. Prince's results B (as provided in footnote 41) must be included as a finding of fact. In addition, Harris County urges the ALJ to take the new scientific evidence into consideration and rule that operation of the facility would have an adverse effect on the health of the requesters who live within one mile of the facility.

The ALJ also states that, "even the opposing parties' expert toxicologist conceded that she can't say it is more likely than not that the PM_{2.5} emissions from Applicant's operations will

³⁷ PFD at 26.

cause an adverse health effect.”³⁸ Dr. Fraiser’s testimony is quoted out of context. As discussed in Harris County’s briefs, “no standard can completely guarantee that there’s no health effects,” Dr. Fraiser stated in a response to a question by opposing counsel.³⁹ What it amounts to is what is acceptable risk and that is based on a comparison with a threshold. SCC bases it on the 1997 NAAQS threshold and Dr. Fraiser bases it on newer scientific data. As Dr. Fraiser explains, “the risks cannot be quantified” or one “cannot predict the probability” specific to the SCC’s proposed facility (i.e., if it is more likely than not that the PM_{2.5} emissions from the proposed facility will have adverse impacts)⁴⁰ because, “you would need to add a toxicity factor that considers the shape and the slope of the dose-response curve” and you don’t have EPA-published toxicity factors.”⁴¹ But in absence of such factors, “the typical assessment is to compare a model site concentration to a benchmark, and “you can presuppose that if EPA is recommending to set a benchmark at a particular level, that EPA believes that there’s a *likelihood* that health effects would . . . occur above it.”⁴² (Emphasis added). Thus, neither Dr. Fraiser or Dr. Dydek can positively state that it is more likely than not that the PM_{2.5} emissions from SCC facility will have an adverse impact but based on different thresholds each uses, they can provide testimony on the potential for adverse impacts. Dr. Fraiser, relying on the most up-to-date scientific studies and EPA staff paper, makes her recommendations based on her scientific assessment of the thresholds above which one would expect potential adverse health impacts which is in line with the air pollution definition in the Texas Clean Air Act of “may tend to be injurious or adversely impact health.”

EPA Proposed Rulemaking. As to ALJ’s position about revisions to the standards, the ALJ notes that the EPA by consent decree had agreed to complete proposed rulemaking by December 20, 2005, and that the staff proposal has not been adopted by the Administrator. Since much is discussed about the staff paper being subject to revision or outright rejection by the Administrator in the PFD, the ALJ, similar to taking judicial notice of the proposed TCEQ total suspended particulate rulemaking in the PFD, is not precluded from taking judicial notice of the EPA proposed rulemaking issued December 20, 2005. The Administrator’s decision and the

³⁸ PFD at 27.

³⁹ Tr. at 434, line 25; at 435, line 1.

⁴⁰ Tr. at 402, lines 4-17.

⁴¹ *Id.*; Tr. at 404, lines 10-20.

⁴² *Id.*

proposed rulemaking have been widely covered in the print and broadcast media; however, Harris County and the City of Houston are hesitant to discuss the details because it is outside of the record. But Harris County and the City of Houston respectfully urge the ALJ to take judicial notice of the EPA proposed rulemaking on PM_{2.5} and the Administrator's position which is directly pertinent and relevant to this discussion.

Issue 3: Would operation of the facility adversely affect the ability of the requesters to use and enjoy their property or cause damage to the requester's property.

The ALJ found that operation of the facility is not likely to have an adverse effect on the ability of persons or entities around the facility to use and enjoy their property or cause damage to property around the facility.

Exception 3: Harris County and the City of Houston disagree that the operations of the facility are not likely to have an adverse effect on the ability of persons or entities around the facility to use and enjoy their property or cause damage to property around the facility. Harris County and the City of Houston except to Finding of Facts Nos. 64, 65, 66, 67, and Conclusion of Law No. 11.

Compliance with nuisance conditions can be seen not just in the context of TSP standards but also the opacity standards,⁴³ nuisance rule under 30 Tex. Admin. Code § 101.4 and compliance history. One can have nuisance conditions regardless of predictions related to TSP standards as documented in Harris County exhibits relating to SCC's notices of violations and investigation reports.

TSP. Because of flaws in SCC's emission rate inputs, rebuttal modeling provided by the SCC does not provide persuasive testimony that TSP standards will not be exceeded. In fact, Mr. Hunt's screening modeling indicates that the one-hour and three-hour TSP standards cannot be met at 100 feet from the crushing operations.

Nuisance. The ALJ only relies on TSP modeling, testimonies offered by Mr. Stephenson and Mr. Rubenstein, and past NOV's. The expert testimony of Ms. Guynn, a Harris County Senior Investigator and Training Coordinator for fifteen years is completely disregarded. Ms. Guynn testified that based on her fifteen years of real-life experience with investigating and inspecting these types of violations at over 100 concrete crushing and other similar materials

⁴³ 30 Tex. Admin. Code §§ 111.111 and 111.113.

handling facilities,⁴⁴ dust emissions from vehicle traffic and product and raw material stockpiles within the facility are two major concerns. Ms. Guynn also has experience with SCC because she has investigated and inspected SCC's concrete crushing operations at their Chrisman facility and reviewed their compliance record with Harris County Pollution Control Division.⁴⁵ The record includes no other testimony from someone of Ms. Guynn's regulatory experience with inspecting and investigating SCC facilities or other similar facilities; and especially with regard to nuisance violations. Ms. Guynn provided her expert opinion that it is likely that surrounding businesses will be impacted by nuisance dust because of proximity, inadequacy of permit provisions, and examples of SCC's management practices at Chrisman facility where four nuisance-related NOV's were issued in little over a two-year period.⁴⁶

Compliance History. It is also perplexing that the ALJ finds the NOV's in the record are not persuasive stating that none of the Applicant's facilities have been cited for nuisance complaints since 2002 (it is more correct to say May 14, 2002). The ALJ states that SCC has not received a violation notice for dust emissions since 2002 and makes the argument that based on recent history, nuisance is unlikely to occur. Harris County and the City of Houston beg to differ. As a threshold issue, TCEQ's compliance history rules consider five years of a facility's compliance history from the date the application was received and only covers October 6, 1998 to October 6, 2003.⁴⁷ Thus, the last two years the ALJ refers to as being "a better predictor of future operations" are not considered by the TCEQ or even a part of the record. In addition, remaining in compliance while TCEQ was reviewing SCC's application does not constitute a representative sample of SCC's "improved" compliance history, and is not an accurate predictor of future actions. The ALJ must consider and find persuasive all NOV's within the five-year time period considered by the TCEQ. A finding of fact to the contrary directly goes against TCEQ rules on compliance history which assesses compliance history for a period of five years. The ALJ must also include a finding of fact that lists the customer classification as average with 2.240 rating, as provided in SCC's compliance history in Applicant Exhibit 7.

The ALJ also only refers to four nuisance-related violations but in the time period considered by the TCEQ, according to SCC, since January 1, 1999, SCC has received nine

⁴⁴ HC-Ex 29 at 4, lines 23-36.

⁴⁵ HC-Ex 29 at 9, lines 29-33.

⁴⁶ HC-Ex 29, at 17, lines 19-27.

⁴⁷ A-Ex 7; 30 Tex. Admin. Code § 60.1(b).

violation notices of which seven have been dust-related violations.⁴⁸ Since 2000, SCC's compliance history with Harris County includes 15 complaints and 6 notices of violations issued for non-compliance with permit provisions as well as nuisance and outdoor burning requirements.

Secondly, just because there are no violations issued to SCC by Harris County since 2002 does not mean that all of SCC's facilities have been operating in compliance or that no complaints have been received by TCEQ and the City of Houston which also have jurisdiction over these facilities. The TCEQ's compliance history for this application ends at October 6, 2003. TCEQ's compliance history is incomplete and does not establish whether there have been any violations or enforcement actions taken against SCC since October 6, 2003. Also, according to Mr. Miller, there are no crushers at either 14329 Chrisman Road or 15015 East Freeway Drive locations which were the facilities for which Harris County received complaints from citizens, conducted investigations, and issued notices of violations.⁴⁹ Thus, it is not surprising that with no permitted facilities operating at the site, there have been no permit-related violations at either of those two locations.

The ALJ also states that the SCC has a perfect 0.0 Compliance History rating for the crusher that the Applicant seeks to have moved to the 288 site.⁵⁰ That is an incorrect statement. SCC has a perfect 0.0 Compliance History rating for the 14329 Chrisman Road which is not the crusher that the SCC seeks to have moved. SCC's application involves relocating the crusher from the 5001 Gasmer Road location.⁵¹ Applicant Exhibit 7 clearly lists 14329 Chrisman Road as the location. There is nothing in the record about the compliance history for the crusher that Applicant seeks to have moved to the 288 site from the Gasmer location.

Even for the Chrisman location which is not the permitted facility under consideration for relocation, the TCEQ's compliance rating classification provides a 0.0 score to SCC; yet fails to take into consideration the 5 violations issued for the Chrisman Road site by Harris County Pollution Control Division during the time period considered by TCEQ's compliance history.⁵²

Issue 4: Would Operation of the Facility have an Adverse Effect on Air Quality?

⁴⁸ A-Ex 51 at 10, lines 4-13.

⁴⁹ A-Ex 51 at 3, lines 16-18.

⁵⁰ PFD at 32.

⁵¹ See 30 Tex. Admin Code § 60.2(a)

⁵² HC-Ex 29 at 10, lines 13-20.

The ALJ found that operation of the facility is not likely to have an adverse effect on the ability of persons or entities around the facility to use and enjoy their property or cause damage to property around the facility.

Exception 4: Harris County and the City of Houston disagree that the operations of the facility are not likely to have an adverse effect on air quality. Harris County and the City of Houston except to Finding of Fact Nos. 68, 69, and Conclusion of Law No. 12.

As discussed by the ALJ, it is correct that air quality issues were discussed in the context of health and nuisance impacts. However, an overarching issue is that the Texas Clean Air Act does not limit the definition of air pollution based on the exceedance of a particular standard. TEX. HEALTH AND SAFETY CODE § 382.003(3) simply states:

Air pollution” means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that:

- (1) **are or may tend to be** injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or
- (2) interference with the normal use or enjoyment of animal life, vegetation, or property.

According to the Texas Clean Air Act, “air pollution” include concentration and of such duration that “may tend to be” or in other words has the potential to be injurious or adversely affect human health or welfare, animal life, vegetation, or property; or interference with the normal use or enjoyment of animal life, vegetation, or property. In this case, while the 1997 NAAQS standards may not be exceeded, there is ample evidence to indicate that the current NAAQS for PM_{2.5} are not protective at their current level. PM_{2.5} is also of greater concern to the Houston area because as Dr. Fraiser testified, it barely meets the 1997 NAAQS.⁵³ Harris County and the City of Houston urge the ALJ to look outside of parameters set by the NAAQS and TSP and assess the health and nuisance impacts from the context of this definition of air pollution.

Issue 5: Is a Stockpile Limitation Necessary and are Stockpile Emissions Adequately Addressed in the Permit Conditions?

The ALJ found that stockpile emissions are adequately addressed in the permit conditions, except that a stockpile height limitation of 45 feet and be added to the permit

⁵³ Tr. at 429; lines 21-24.

conditions. The ALJ also added a permit requirement that Applicant should be required to water all stockpiles, both raw material and finished product, at least twice a daily on all days for which there is no measurable amount of precipitation at the 288 site.

Exception 5: Harris County and the City of Houston agree that a stockpile height limitation is necessary; however, they do not agree that stockpile emissions are adequately addressed in the permit conditions. Harris County and the City of Houston except to Findings of Fact 79 (in part, and Conclusion of Law Nos. 13 and 17(c) in part.

Harris County and the City of Houston mostly agree with the ALJ's opinion on this issue. As an entity that enforces the Texas Clean Air Act, clear enforceable provisions are very important and stockpile height limitation as stated by real-life experiences of senior investigator and training coordinator, Ms. Guynn, reduces the likelihood of dust traveling very far off-site. The ALJ relies on Ms. Guynn's opinion about watering requirements which also the watering twice daily as a minimum. As provided in Ms. Guynn's pre-filed testimony,⁵⁴ the special provision as provided in the PFD and Order needs to state, "All raw materials and finished product stockpiles shall be sprinkled with water and/or environmentally sensitive chemicals twice daily, and as necessary, except on days where there has been a measurable amount of precipitation at the facility." (New language in underline.)

Harris County and the City of Houston also differ as to the ALJ's assessment of impacts being limited to "surrounding residential, school, and worship areas."⁵⁵ The 288 site itself is located in an area where TPSC is adjacent to the SCC proposed facility;⁵⁶ and Horticulture Consultants, Inc., a nursery, which leases the property from a subsidiary of TPSC is also directly adjacent to the 288 site.⁵⁷ There are no buffers between these properties. The east-end of the property may be wooded but that abuts the 288 highway. SCC also argues in its closing arguments that it plans to only use approximately 15 acres for crushing operation and plans to leave the rest to be a buffer but that can change at any time because the proposed permit only requires a minimum 100-foot distance requirement from the crushing facility to the property line.⁵⁸

⁵⁴ H-Ex at 15, lines 16-18.

⁵⁵ PFD at 35.

⁵⁶ P-Ex 14 at 2, lines 11-12.

⁵⁷ P-Ex 12 at 2, lines 13-15.

⁵⁸ Note that Harris County and the City of Houston believe that the 100-foot distance requirement is not protective and this issue is covered in Harris County's closing arguments and response.

As the City of Houston's closing arguments stated, the definition of a person under the Texas Clean Air Act is broad, and health and nuisance impacts to non-residential neighbors are equally relevant. Also, the list of issues specifically reference impact on the hearing requestors which include TPSC. Moreover, the facilities that are not adjacent to SCC do not include any material handling facilities similar to SCC's operations and are not of the type that generates levels of particulate matter expected by SCC.⁵⁹ Unlike SCC, TPSC, for example, is not required to obtain air quality authorization nor has it been issued any air quality violations under the state property-line standards.⁶⁰ Similarly, the horticulture facility is simply a nursery. Neither is construed as a facility under the Texas Clean Air Act as in they are not a source of air contaminants requiring authorization from the TCEQ to operate. These facilities, with active employees out in the direct impact area of any emissions from the SCC facility, deserve the same level of health and nuisance protection as residences; and the statutes and TCEQ rules see no distinction.⁶¹

Issue 6: Whether or not the recordkeeping requirements set forth in the draft permit are sufficient to enable enforcement.

The ALJ found that except for watering, no additional recordkeeping requirements are necessary

Exception 6: The ALJ should not have found that except for watering no additional record-keeping requirements are necessary. Harris County and the City of Houston except to Finding of Fact Nos. 84, 85, 86, 87, and Conclusion of Law No. 14.

Asbestos. There are record-keeping requirements for only the following three things in the draft permit: 1) daily and annual amounts processed; 2) daily road cleaning; and 3) records of all repairs and maintenance of abatement system. Thus, Harris County and the City of Houston agree with the ALJ's requirement for SCC to maintain a record of all on-site waterings. However, it is equally important that there be recordkeeping requirements for asbestos. The ALJ states that "inspection and testing could also reveal whether asbestos materials were found at the

⁵⁹ Ms. Guynn described material handling facilities with the potential to emit dust similar to SCC facilities and they do not include the types of facilities that are in the vicinity of SCC. HC-Ex 29 at 4, lines 14-31.

⁶⁰ Tr. at 486, lines 2-4; at 494, lines 23-25; at 495, lines 1-5.

⁶¹ Section 382.065(a) of TEX. HEALTH AND SAFETY CODE simply sets the statutory threshold that concrete crushing facilities will be prohibited if certain locations are within 440 yards. This is separate and distinct from consideration of nuisance and health impacts review.

site, and a finding of asbestos material at the site would likely be a sufficient basis for enforcement action. But as Ms. Guynn testified, "as an investigator, if I'm not there and I can't see it, I don't know whether they are doing it or not."⁶² And regulatory authorities cannot be there every day to ensure that the permit conditions are being met. As Mr. Miller stated, for SCC sites, Harris County and the City of Houston authorities may come around once or twice a year each while TCEQ may come one or two times or none at all.⁶³ Instead, regulatory authorities rely on enforceable permit provisions and recordkeeping requirements. With explicit requirements for scheduled watering, Ms. Guynn can verify that with this additional permit provision; however, she cannot do the same with the asbestos provision. If records are being kept, the investigators can check the records for compliance with the permit.⁶⁴ Without enforceable permitting provisions and associated record keeping requirements, that is not possible.

The ALJ's Findings of Fact 84, 85, and 86 only provide representations by SCC during the hearing. These are not part of the permit application and are not enforceable. Also, SCC maintains that they inspect incoming loads at three points, the weigh station, when unloaded, and when material is being placed in the crusher. This is not adequate. When material is brought in, only the surface is inspected and any asbestos may be hidden under the remaining material. Similarly, at the two other points, asbestos may be concealed by other materials. Also at the two later points, asbestos may already be subject to forces that would crumble it and result in potential air emissions that may cause health effects to employees and off-site receptors.

The ALJ also states that it would be unduly burdensome to require SCC to document every load brought into the facility when such is not a standard requirement for similar facilities. The record only indicates that it is not a standard requirement for similar facility for Harris County. That does not establish that it is consistent with TCEQ's treatment of other concrete crushers statewide. In addition, Harris County and the City of Houston do not believe that it would be unduly burdensome because the requirement does not need to be for SCC to document every load. It could require SCC's customer to complete a short waste characterization sheet (materials received by SCC are wastes under Chapter 330 of TCEQ rules until they are recycled) indicating the source of the material received, the type of material, and a statement that the material does not contain asbestos. The burden of proving whether the material contains

⁶² Tr. at 444, lines 17-19.

⁶³ Tr. at 72, lines 1-14.

⁶⁴ Tr. at 445, lines 6-10.

asbestos would be on the generator, not on SCC. As provided in Ms. Guynn's testimony, proof could be through product knowledge (i.e. asbestos not used in road construction concrete) or analysis (concrete pipe suspected of containing asbestos is analyzed).⁶⁵ Based on Mr. Miller's testimony that roughly 70% of the material is brought in SCC from its road projects and 30% from others,⁶⁶ a waste characterization would not be required for each individual load but for each source. For example, SCC would only have to obtain one waste characterization sheet for a project like road demolition that would generate over 200 truckloads of material. This is not overly burdensome as it can be incorporated into SCC's quoting and billing practices.

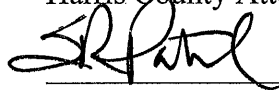
Trained Observer. The ALJ states Harris County's position regarding this issue; however, the ALJ's finding on this issue has been completely overlooked. As discussed fully in Harris County's closing arguments and response, the proposed permit is lacking in that it does not include the requirement that SCC must have an on-site observer that is certified in EPA Methods 9 and 22.

CONCLUSION

As clearly demonstrated by the evidence in the record, it is Harris County's and the City of Houston's position that SCC has failed to meet its burden of proof under each one of the six issues referred to SOAH. As such, Harris County and the City of Houston respectfully request that the ALJ recommend to the commissioners of the TCEQ that SCC's application to change the location of its concrete crushing facility be denied.

Respectfully submitted,

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⁶⁵ HC-Ex 29 at 16, lines 28-34.

⁶⁶ Tr. at 28-29.

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CERTIFICATE OF SERVICE
SOAH DOCKET NO. 582-05-1040
TCEQ Docket No. 2004-0839-AIR

I, Snehal R. Patel, do hereby certify that on February 21, 2006, true and correct copies of the foregoing "Harris County and the City of Houston's Exceptions to the Proposal for Decision" in the above-docketed proceeding were sent via facsimile and First Class Mail to the persons listed on the attached mailing list.

A handwritten signature in black ink, appearing to read "SR Patel", is written over a horizontal line.

Snehal R. Patel
Harris County Attorney's Office

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